Supreme Court, U.S.
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No. 01-338

IN THE

Supreme Court of the United States

THE REPUBLIC OF GUATEMALA, ET AL.,

Petitioners,

— v. —

THE TOBACCO INSTITUTE, INC., ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the fundamental legal defect in Petitioners' claims:

> Did the Court of Appeals correctly hold (in accord with ten unanimous decisions by seven other Courts of Appeals involving similar claims brought by both non-governmental and other governmental health-care payors and providers) that the Petitioners' RICO and federal antitrust claims were barred because the Petitioners' alleged injury — incurring costs to treat smoking-related personal injuries suffered by smokers — was derivative of the personal injuries of the smokers, and thus too remote and indirect as a matter of law?

Petitioners' claims also suffer from multiple additional defects that would provide independent grounds for affirming the decision of the Court of Appeals. *See* pp. 18-20, *infra*.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Companies, Inc. does not have any parent corporations and there is no publicly held company that owns 10% or more of Philip Morris Companies' stock.

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies, Inc.

Philip Morris Companies, Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent Philip Morris International has the following parent corporation:

Philip Morris Companies, Inc.

Philip Morris Companies, Inc. is the only publicly held company that owns 10% or more of Philip Morris International's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporations:

B.A.T Industries p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.

British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent British American Tobacco (Investments) Limited ("BATCo") (f/k/a British-American Tobacco Company Limited) has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
B.A.T Industries p.l.c.
British American Tobacco (Holdings) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATCo's stock.

Respondent B.A.T Industries p.l.c. has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of B.A.T Industries p.l.c.'s stock.

Respondent Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") does not have any parent corporations and there is no publicly held company that owns 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. ("TI") does not have any parent corporations and there is no publicly held company that owns 10% or more of TI's stock.

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STATEMENT OF THE CASE

This case is one of many brought by third-party health-care payors or providers against tobacco companies to recover costs associated with the treatment of *other persons*' personal injuries allegedly caused by smoking. These cases have spawned eleven decisions from the Courts of Appeals, in eight different circuits. In each of those eleven decisions, the Courts of Appeals have ruled — *unanimously*, without a single dissent — that *all* claims must be dismissed as a matter of law because those claims were remote, indirect, and derivative of the personal injuries of individual smokers. The Courts of Appeals also have denied rehearing and rehearing *en banc* in each of the cases in which plaintiffs sought such rehearing. And last year, this Court denied petitions for certiorari in the first three such cases to be decided by the Courts of Appeals.*

Petitioners here are foreign governments that sought recovery for health-care costs allegedly incurred treating individuals with tobacco-related illnesses. *See, e.g.*, App. 6, 21; *see also, e.g.*, JA94 (¶3); JA132 (¶3); JA221 (¶4).** In 1998, Guatemala filed a lawsuit that asserted federal RICO and antitrust claims as well as common-law claims. *See* JA93. Nicaragua and Ukraine filed similar lawsuits in late 1998 and 1999, respectively. *See* JA131; JA220.

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* *See Oregon Laborers* v. *Philip Morris*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); *Laborers Local* v. *Philip Morris*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); *Steamfitters* v. *Philip Morris*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000). A similar petition for writ of certiorari is also currently pending before this Court in *Association of Washington Pub. Hosp. Dists.* v. *Philip Morris*, No. 01-121.

** Citations in the form "App.__" are to the appendix attached to Petitioners' petition. Citations in the form "JA__" are to the Joint Appendix submitted to the D.C. Circuit in the appeal below.

On December 30, 1999, the district court granted defendants' motion to dismiss the *Guatemala* case, *see* App. 19-41, holding that dismissal was required because "the alleged injury is too remote and completely derivative of the injuries suffered by individual Guatemalan smokers." App. 20-21.

Following its *Guatemala* decision, the district court issued an Order to Show Cause directing Nicaragua and Ukraine to show why the court should not likewise dismiss their cases "for the reasons set forth" in its *Guatemala* decision. JA341-JA342. After briefing, the district court granted dismissal of the *Nicaragua* and *Ukraine* cases "for the reasons set forth in its earlier Opinion regarding the Republic of Guatemala." App. 42-46.

Guatemala, Nicaragua, and Ukraine appealed the dismissals of their complaints to the D.C. Circuit, which consolidated the appeals for briefing and argument. The D.C. Circuit also scheduled those appeals for hearing on the same day and before the same Panel as appeals in similar lawsuits filed by various union funds. On May 22, 2001, the D.C. Circuit issued one decision in all of these appeals holding that "the funds' and the nations' claims are 'too remote, contingent, derivative, and indirect to survive.'" App. 18 (quoting district court opinion at App. 29). In so holding, the D.C. Circuit followed the decisions of all seven Courts of Appeals which have likewise so ruled — each unanimously — in cases brought by other third-party healthcare payors or providers. *See* App. 8.

Petitioners did not seek rehearing or rehearing *en banc* from the D.C. Circuit's decision. The union funds did file a petition for rehearing *en banc*, and that petition was denied with no judge on the D.C. Circuit having requested a vote on whether to rehear the case *en banc*. *See* Order (D.C. Cir. July 13, 2001).

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decisions of other Courts of Appeals, decisions of this Court, or

decisions from state courts of last resort. Thus, review by this Court is not warranted.

In particular, as discussed below, eight Courts of Appeals (in eleven separate decisions, including the decision below) have now unanimously ruled that claims by third-party health-care payors or providers against tobacco companies to recover costs incurred to treat personal injuries of individuals must be dismissed because the alleged injury is remote, indirect, and derivative. In the three such cases in which plaintiffs sought certiorari, this Court denied petitions that presented essentially the same questions and advanced essentially the same arguments as the instant Petition.*

Respondents recognize that the Court is not bound by its prior denials of certiorari. However, in the time since the filing of the petitions for certiorari rejected by this Court in January 2000, subsequent developments have only rendered certiorari *less* appropriate: *eight* additional Court of Appeals decisions (including decisions from *five* additional circuits) have unanimously *agreed* with the decisions as to which certiorari was previously denied, reiterating that claims of third-party payors or providers against tobacco companies fail as a matter of law.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

Nowhere in their petition do Petitioners even attempt to argue that there is a conflict among the Courts of Appeals on the questions presented. Indeed, quite to the contrary, *eight* different Courts of Appeals have considered claims by third-party payors or providers — ranging from union funds to hospitals to Blue Cross insurers to foreign governments — to recover

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* *See* p. 1 n.*, *supra*; *compare* Petition *with* petitions for writs of certiorari in Nos. 99-545 (*Steamfitters*), 99-642 (*Oregon Laborers*), and 99-791 (*Laborers Local*).

health-care costs incurred treating personal injuries allegedly caused by smoking. And all eight Courts of Appeals *unanimously* and correctly have held that such claims must be dismissed because the injury alleged is remote, indirect, and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing:

- **Second Circuit:** "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and therefore too remote as a matter of law for them to have standing to sue defendants." *Laborers Local*, 191 F.3d at 244.

- **Third Circuit:** Plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part." *Steamfitters*, 171 F.3d at 928; *see also Allegheny Gen. Hosp.* v. *Philip Morris*, 228 F.3d 429, 445 (3d Cir. 2000).

- **Fifth Circuit:** "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] ...." *Texas Carpenters* v. *Philip Morris*, 199 F.3d 788, 789-90 (5th Cir. 2000).

- **Seventh Circuit:** "The injury for which the plaintiffs seek compensation is remote indeed ...." *International Bhd. of Teamsters* v. *Philip Morris*, 196 F.3d 818, 825-26 (7th Cir. 1999).

- **Eighth Circuit:** "We agree with the ... other circuits that have denied antitrust and RICO standing to ERISA plans who seek to recover for this type of indirect injury." *Lyons* v. *Philip Morris*, 225 F.3d 909, 914 (8th Cir. 2000).

- **Ninth Circuit:** "[P]laintiffs' RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery." *Oregon Laborers*, 185 F.3d at 964; *see also As-*

sociation of Washington Pub. Hosp. Dists., 241 F.3d 696, 703 (9th Cir. 2001); *Regence BlueShield* v. *Philip Morris*, 2001 WL 205996, at *2 (9th Cir. Feb. 28, 2001).

- **Eleventh Circuit:** "[A]ll of Plaintiff's claims, as a matter of law, are barred by the doctrine of proximate cause." *United Food & Commercial Workers Unions* v. *Philip Morris*, 223 F.3d 1271, 1273 (11th Cir. 2000).

- **District of Columbia Circuit:** "the funds' and the nations' claims are 'too remote, contingent, derivative, and indirect to survive.'" App. 18 (quoting district court opinion at App. 29).

The remarkable uniformity of the results in these eleven decisions from eight circuits more than demonstrates the absence of a circuit split that might warrant this Court's review.

The issue here is not difficult. As shown in the next section, the conclusion that all eight circuits have reached is compelled by a legal principle that has been the settled law of this Court and this country for over 150 years. As set forth in *Holmes* v. *SIPC*, 503 U.S. 258, 268-69 (1992), a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.

A. This Court's decisions mandate the dismissal of Petitioners' remote claims.

There is no conflict between the D.C. Circuit's decision below and any decision of this Court. To the contrary, as the Courts of Appeals have recognized, dismissal of third-party payor and provider claims to recover health-care costs incurred

treating smokers follows inexorably from this Court's precedents. As this Court observed in *Holmes*, a tortious act will often cause "ripples of harm" extending to various persons. 503 U.S. at 266 n.10. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims from recovering in their own right from the tortfeasor.

The rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. No fewer than four decisions of this Court articulate this "requirement" of direct injury — "one of [the] central elements" of proximate causation. *Id.* at 269.

Thus, in 1877, in *Mobile Life Ins. Co.* v. *Brame*, this Court barred a life insurer's attempt to recover directly from the murderer of its insured, reasoning: "The injury inflicted by [the defendant murderer] was upon [the insured], against his personal rights; that it happened to injure the plaintiff [insurance company] was an incidental circumstance, a remote and indirect result .... " 95 U.S. 754, 758-59 (1877). This Court added: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Thereafter, in *United States* v. *Standard Oil*, 332 U.S. 301, 311-16 (1947), this Court held that the United States government did not have a cause of action in its own right under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

In two subsequent decisions, this Court expressly incorporated the settled common-law bar to recovery for remote injuries into the antitrust laws and RICO. *Associated General Contractors* v. *California State Council*, 459 U.S. 519, 531-33 (1983) ("*AGC*"); *Holmes*, 503 U.S. at 268-71.

In *AGC*, this Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-333. *AGC* illustrates the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony* v. *Slaid*, 52 Mass. 290 (1846) (Shaw, C.J.). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after the defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery. The court concluded that the *town* could not sue a tortfeasor for medical expenses resulting from an assault on a town pauper; therefore, a party that had *contracted with* the town to pay its paupers' expenses could not maintain such a suit. Notwithstanding the intentional nature of the tort, the injury to Anthony was "too remote and indirect." 52 Mass. at 291.

Thereafter, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that the Securities Investor Protection Corporation — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against insiders whose stock manipulation had caused the failure of the broker-dealers, which had in turn caused the customers' loss. While the manipulation caused cognizable harm to the broker-dealer, this Court held that "the link is *too remote* between the stock manipulation alleged and the customers' harm." *Id.* at 271 (emphasis added).

Thus, the injury the Petitioners allege — incurring health-care costs to treat personal injuries suffered by smokers (*see* p. 1, *supra*) — falls squarely within a category of injuries that has been held to be remote, indirect, and derivative for over 150 years. As the D.C. Circuit recognized, it is "abundantly clear that the injury that [the nations] purportedly suffered occurred only as a consequence of the harm to individual smokers." App. 6 (quoting district court opinion at App. 28) (brackets in original). Indeed, "the 'tortured path' from the defendants' alleged wrongdoing to the nations' increased expenditures 'demonstrates that [the nations'] claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out.'" App. 6-7 (quoting district court opinion at App. 28-29) (brackets in original).

Indeed, the injury the Petitioners allege is *even more* remote and indirect than the injuries held non-actionable in *AGC* and *Holmes*. As in *AGC* and *Holmes*, the injury Petitioners allegedly suffered (increased health-care costs) is an indirect and derivative consequence of prior harm visited on *other* persons. But the plaintiffs in *AGC* and *Holmes* at least asserted an injury separate from that of the directly injured party. Not so here. Here, the Petitioners' alleged injury is *further* derivative of the harm visited on *other* persons because the only injury the Petitioners allege is the *treatment of those other persons' injuries*. *See* App. 13 ("the alleged harm arising from payment of medical expenses by … the nations is itself derivative of alleged injuries to individual smokers, and the alleged 'infrastructure' harms are even more remote than the damages for medical payments").

And the fact that Petitioners here are foreign governments, which allegedly have a "constitutional obligation to provide free health care to [their] citizens," (Pet. 17) does not alter the analysis. As the D.C. Circuit properly recognized: "The decisions of the Third and Ninth Circuits in *Allegheny* and *Washington Public Hospital* are instructive with respect to the nations' claims because, like the nations, the plaintiffs in both cases were le-

gally obligated to directly provide health care to smokers who could not afford to pay for such services." App. 11 n.5. And, as noted above, in *United States* v. *Standard Oil*, 332 U.S. at 311-16, this Court held that the *United States* government did not have a direct right of action under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier.

B. Petitioners mischaracterize the decision below and decisions of this Court in an effort to manufacture a conflict.

1. The D.C. Circuit did not announce a test that conflicts with this Court's decisions. The D.C. Circuit's holding that Petitioners' claims fail because "the harms alleged by ... the nations are too remote from the defendants' alleged wrongdoing to provide antitrust or RICO standing" (App. 13) does not conflict with this Court's prior decisions. Rather the D.C. Circuit correctly focused on the nature of the alleged *injury*, and its relation to the defendant's conduct. As this Court held in *Holmes*, proximate cause "demand[s]" as one of its "central elements" a "*direct relation* between the *injury* asserted and the *injurious conduct* alleged." 503 U.S. at 268-69 (emphasis added).

The D.C. Circuit simply applied this principle from *Holmes* to the cases at bar and found that "application of the *Holmes* factors reveals that ... the nations fail to demonstrate proximate cause." App. 11 (internal citation omitted). And in so finding, the D.C. Circuit concurred with the "seven circuit courts of appeal [that] have rejected claims similar to those brought by ... the nations." App. 7.

Petitioners nonetheless argue that "[t]he D.C. Circuit ignored this Court's authority holding that a plaintiff may sue even when his injury derives from the effects of a defendant's misconduct on intervening third parties." Pet. 15. But the D.C.

Circuit's decision does not in any way conflict with any of this Court's decisions. For example, in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982) (Pet. 15), the plaintiff was *directly* injured as a participant (buyer) in the market for psychotherapy services. *See AGC*, 459 U.S. at 540 n.44; *see also Steamfitters*, 171 F.3d at 926; *Oregon Laborers*, 185 F.3d at 967.

Nor does the D.C. Circuit's decision conflict with this Court's decision in *NOW* v. *Scheidler*, 510 U.S. 249 (1994) (Pet. 15). The only issue on which this Court granted certiorari in *NOW* was whether an economic motive was required for a RICO claim, and the only standing issue addressed by this Court was the "threshold" issue whether plaintiffs had jurisdictional, *i.e.*, Article III, standing — which requires only injury-in-fact and *not* the proximate cause requirement of "direct injury" that bars plaintiffs' claims here. 510 U.S. at 252, 255-56; *see also AGC*, 459 U.S. at 535 n.31 ("constitutional standing" requires only "injury in fact"). Thus, as the Courts of Appeals have recognized, *NOW* did not involve any proximate cause or remoteness issue. *See, e.g., Association of Washington Pub. Hosp. Dists.*, 241 F.3d at 704 n.4 (*NOW* concerned "constitutional standing, not RICO or antitrust standing"). Not surprisingly, *NOW* made no mention of *AGC* or *Holmes*. Moreover, the plaintiff clinics in *NOW* did not, like Petitioners here, allege derivative injuries suffered by reason of physical injuries inflicted upon others.

And although this Court in *Sedima* v. *Imrex*, 473 U.S. 479, 497 (1985) (Pet. 14, 15), noted generally that "RICO is to be read broadly," the case did not involve any issue of proximate cause or standing to pursue RICO claims for remote and indirect injuries. Thereafter, in *Holmes*, this Court squarely held that — notwithstanding the "congressional admonition that RICO be 'liberally construed to effectuate its remedial purposes'" — Congress intended to require direct injury in RICO actions. 503 U.S. at 265-68, 274. As this Court stated, "[a]llowing suits by those injured only indirectly" actually

would "*undermin*[*e*] the effectiveness of treble-damages suits." *Holmes*, 503 U.S. at 274 (quoting *AGC*, 459 U.S. at 545) (emphasis added) (bracket in original).

Nor did the D.C. Circuit err in any way in its application of *Holmes* to the complaints at bar. The D.C. Circuit found that "application of the *Holmes* factors reveals that ... the nations fail to demonstrate proximate cause." App. 11 (internal citation omitted):*

- **Speculative Nature of the Harm.** The D.C. Circuit recognized the difficulty that would be entailed in calculating Petitioners' alleged damages: "considerable speculation would be involved in identifying the costs ... to the nations' treasuries that the plaintiffs contend have deterred or prevented them from financing various health care programs." App. 14; *see also, e.g.*, *Laborers Local*, 191 F.3d at 239-40 (describing plaintiffs' alleged damages as "incredibly speculative," "the sheerest sort of speculation," and "virtually impossible to determine").**

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* Petitioners' argument that the D.C. Circuit somehow "did not apply Rule 12(b)(6)" in making these inquiries (Pet. 10) is baseless. *See* App. 7 ("review[ing]" the district courts' orders "under Federal Rule of Civil Procedure 12(b)(6) ... *de novo*"). To the extent Petitioners seem to be suggesting that such an inquiry is somehow inappropriate upon a motion to dismiss, Petitioners' suggestion flies in the face of this Court's decisions in *Holmes* and *AGC*, where this Court upon pre-trial motions concluded that the alleged injuries were too remote as a matter of law — to say nothing of the *ten* other unanimous decisions (from seven other Courts of Appeals) which have likewise reached the identical conclusion upon *motions addressed to the face of the pleadings* in these third-party-payor and provider tobacco actions. *See* cases cited at pp. 4-5, *supra*.

** *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), *Texaco* v. *Hasbrouck*, 496 U.S. 543 (1990), and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (Pet. 12-13) are inapposite. Those cases did not involve any issue of directness of injury or proximate cause, but rather the *separate* requirement that a plaintiff must prove damages with requisite certainty to satisfy the requirement of *antitrust injury*.

- **Risk of Duplicative Recovery / Complex Apportionment of Damages.** The D.C. Circuit recognized that suits by individual smokers pose a risk of duplicative recovery. *See* App. 15 ("courts would be required to allocate damages among various classes of directly and indirectly injured parties … in a manner that protects the tobacco industry from being held repeatedly liable for the same alleged wrongdoing").

- **Deterring Injurious Conduct.** The D.C. Circuit recognized that "individual smokers constitute a group of potential plaintiffs possessed of more direct claims who can be counted on to deter the alleged wrongdoing." App. 17; *see also*, *e.g.*, *Laborers Local*, 191 F.3d at 241 (actions by smokers will "promote 'the general interest in deterring injurious conduct,' which *Holmes* noted as the objective of this policy factor").*

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* In any event, Defendants respectfully submit that *AGC* and *Holmes* do not require that the "factors" discussed therein — which *Holmes* described as "*reasons*" for the "directness of relationship" "*requirement*" (503 U.S. at 269 (emphasis added)) — be applied anew in every case, even in categories of cases in which the principles of proximate causation are long-settled, as they are here. Although a black-letter rule cannot be announced that would dictate the result in "every case" (as this Court observed in *AGC*, 459 U.S. at 536, and *Holmes*, 503 U.S. at 272, n.20), that does not mean that *no* black-letter rule can ever be announced that would require dismissal in *any* case. For example, it is uniformly settled that a corporate shareholder may not bring a "direct" claim to recover for diminution to the value of his shares occasioned by injury to the corporation. Thus, there is no need in each attempted "direct" suit by a shareholder to engage in a case-by-case analysis of the policy factors; rather, it is well-settled that the shareholder's only recourse lies in bringing a derivative suit on behalf of the corporation. Nor should there be any need to engage in an *ad hoc* review of the policy factors here where another long-settled rule likewise applies to require dismissal, to wit, "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage." *Laborers Local*, 191 F.3d at 237.

2. This Court's standing analysis does *not* assume the existence of a "proper plaintiff" for every RICO or antitrust violation. Petitioners argue that some plaintiff must always be afforded standing to bring a federal treble damages suit under RICO or the antitrust laws for every injury, no matter how remote, indirect, and derivative the plaintiff's injury. *See* Pet. 10, 14. But as the D.C. Circuit correctly recognized, "the nations err in assuming that the proximate cause analysis called for by *AGC* and *Holmes* is a quest for the 'best' (or, realistically, 'least bad') plaintiff." App. 9.

AGC explicitly rejected any contention that there must always be a plaintiff with standing to bring a federal statutory treble damages suit for every injury: "*Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.*" 459 U.S. at 534 (emphasis added); *see also Holmes*, 503 U.S. at 268 (proximate cause is a "judicial tool[] used to limit a person's responsibility for the consequences of [his] acts"); *Schlesinger* v. *Reservists Committee*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). Thus, as the D.C. Circuit stated: "[T]he Supreme Court has insisted on an appropriate plaintiff, namely, a plaintiff whose alleged injury possesses a sufficiently direct causal relationship to the alleged wrongdoing." App. 9.

Moreover, Petitioners' theory turns Congressional intent on its head. The inability of those directly injured (*i.e.*, individual smokers) to sue under RICO or the antitrust laws for their health-care costs because personal injuries are not injuries to "business or property," *see* p. 19, *infra*, is hardly a point in *favor* of allowing Petitioners — who are only indirectly injured — to sue under these federal statutes for those same injuries. This would flout Congress' policy determination not to permit recovery of personal injury damages, including health care costs, in RICO or antitrust treble damage actions — no

matter by whom asserted. *See, e.g.*, *Laborers Local*, 191 F.3d at 241 ("the lack of a RICO damages remedy for even direct personal injuries ... actually weighs heavily *against* RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others") (emphasis in original).*

3. Petitioners' arguments based on their status as foreign governments are without merit and raise no issue of conflict that would warrant review. Unable to point to any conflict whatsoever between the D.C. Circuit's decision and any decision of this Court or any other Circuit, Petitioners attempt to suggest that the D.C. Circuit's decision somehow in reality was not predicated upon the well-settled legal principles set forth above, but rather on a supposed "subtext." Pet. 8. Thus, Petitioners assert in conclusory fashion that "[d]espite the ... reason for dismissal" actually identified by the D.C. Circuit, the decision was in reality instead based on "the D.C. Circuit's reluctance to countenance the Nations' use of the United States judicial system." Pet. 8-9.

Petitioners' suggestion of some "subtext" behind the D.C. Circuit's decision is without merit. Indeed, far from the decision below having been animated by some such asserted anti-foreign-government "subtext," it is amply clear that the D.C.

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* Yet another argument the D.C. Circuit expressly rejected is that specific intent or the alleged foreseeability of the harm favors granting Petitioners standing: "[T]he circuits have rejected the contention that specific intent ... or that the foreseeable nature of the harms alleged is sufficient to satisfy the proximate cause requirement." App. 12 (citing *Allegheny*, *Laborers Local*, and *Steamfitters*). "[F]oreseeability and direct injury (or remoteness) are distinct concepts, both of which must generally be established by a plaintiff." App. 17 (quoting *Laborers Local*, 191 F.3d at 236). Furthermore, in *AGC*, this Court squarely held that even a combination of "foreseeability" and an alleged specific intent to injure the plaintiff does *not* overcome the bar against remote claims — reversing the Ninth Circuit decision (648 F.2d at 536-39) which had held such a pleading sufficient on precisely those grounds. *See* 459 U.S. at 525-26, 537-38, 537 n.37, 540-45.

Circuit simply applied in an even-handed fashion the long-settled principles that bar such remote claims. As the Seventh Circuit (Easterbrook, J.) put it in another of these third-party payor cases: "For more than 100 years state and federal courts have adhered to the principle (under both state and federal law) that the victim of a tort is the proper plaintiff," and insurers or other third-party providers of assistance and medical care to the victim "may recover as subrogee or not at all." *Teamsters*, 196 F.3d at 822, 827.

Indeed, as noted above, in *United States* v. *Standard Oil*, this Court rejected the remote, indirect, and derivative claims of no less a sovereign than the United States government, which sought to recover in its own right from a tortfeasor the costs of health care incurred as a result of injury to soldiers. *See* 332 U.S. at 302, 304 n.5, 311-16; *see also Teamsters*, 196 F.3d at 822 (citing *Standard Oil*). There is no reason to treat foreign governments more favorably than our own.

In short, as the District Court aptly summed it up in directing dismissal of Guatemala's case:

> If it has been injured, the Republic of Guatemala, like any other litigant, may bring suit in this Court to vindicate its interests. The same principles of American jurisprudence that would be applied in testing any other litigant's claims, however, must be applied in evaluating the claims asserted by Guatemala .... Guatemala has alleged no injury resulting from defendants' alleged misconduct that is sufficiently direct to allow Guatemala to assert its claims. Guatemala's complaint therefore must be dismissed.

App. 40-41; *see also* App. 18 (D.C. Circuit: "the funds' and the nations' claims are 'too remote, contingent, derivative, and indirect to survive'") (quoting district court opinion at App. 29).*

Finally, Petitioners' attempt at the very end of their petition (Pet. 19-20) to suggest that there is an issue concerning *parens patriae* standing that somehow warrants review in these cases is patently without merit. As a threshold matter, as the D.C. Circuit recognized, "[t]he nations' assertion that they may proceed in *parens patriae* is a dubious assertion at best." App. 10; *accord Estados Unidos Mexicanos* v. *DeCoster*, 229 F.3d 332, 336 (1st Cir. 2000). And Petitioners do not even attempt to point to any conflict between the decision below and any decision by this Court or any Circuit concerning the availability of *parens patriae* standing to foreign governments.** But even more fundamentally, as the D.C. Circuit recognized, "such [*parens patriae*] status [does not] eliminate[] or adequately substitute[] for proximate cause. Rather, the doctrine of *parens patriae* is merely a species of prudential standing, and does not

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* There is no conflict between the D.C. Circuit's decision below and any decision of this Court (or any Court of Appeals) that has allowed a foreign government to proceed with an action in other contexts. Petitioners cite *Pfizer* v. *Government of India*, 434 U.S. 308 (1978) (Pet. 17), but the only thing this Court held in *Pfizer* was that foreign governments were among the "person[s]" entitled to sue under the antitrust laws — *i.e.*, that foreign governments could sue "*to the same extent as any other person.*" *Id.* at 319 (emphasis added). Indeed, in *AGC*, this Court expressly distinguished *Pfizer* on the ground that, in that case, "the actual plaintiff was *directly* harmed by the defendants' unlawful conduct." *AGC*, 459 U.S. at 530 n.19 (emphasis added).

** The only cases Petitioners claim support their *parens patriae* assertion (Pet. 20) are prior cases from *within the D.C. Circuit* itself — cases which were all cited to the D.C. Circuit below and which were quite obviously (and correctly) found by the D.C. Circuit *not* to support Petitioners' arguments. *See* App. 10. But even putting aside that there is no conflict between the decision below and any prior D.C. Circuit or D.C. District Court decision, any such hypothetical *intra*-circuit conflict would in any event have been more appropriately the subject of a petition for rehearing addressed to the D.C. Circuit than a petition for certiorari. Tellingly, Petitioners did not even *attempt* to file any such petition for rehearing in the D.C. Circuit.

create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents." App. 10 (internal citation omitted); *see also Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. 592, 599-610 (1982) (*parens patriae* is doctrine of standing); *Hawaii* v. *Standard Oil*, 405 U.S. 251, 257-59 (1972) (*parens patriae* standing in State does not relieve it of obligation of satisfying substantive elements of claims). Accordingly, since any such *parens patriae* standing would in any event not overcome the well-settled principles of proximate cause that required dismissal of Petitioners' claims, review by this Court of any *parens patriae* standing issue is plainly not warranted in these cases.

III. PETITIONERS' OTHER CLAIMS OF CONFLICT ARE WITHOUT MERIT.

As noted above, every federal Court of Appeals to have addressed these issues *unanimously* has ruled that third-party payors and providers cannot sue tobacco companies under RICO or the federal antitrust laws to recoup health-care costs allegedly associated with smoking. *See* pp. 3-5, *supra*. Numerous district courts have issued decisions to the same effect.*

Petitioners attempt to rely on certain trial-court decisions (almost all of which are unpublished) involving claims brought by State Attorneys General. Pet. 18 n.6. Petitioners' arguments

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* *See, e.g., Alabama Coushatta Tribe* v. *American Tobacco Co.*, No. 1:00CV596, slip op. (E.D. Tex. Aug. 31, 2001); *Acoma Pueblo* v. *American Tobacco Co.*, No. CIV 99-1049M/WWD, slip op. (D.N.M. July 30, 2001); *Rhode Island Laborers'* v. *Philip Morris*, 99 F. Supp. 2d 174 (D.R.I. 2000); *Arkansas Carpenters'* v. *Philip Morris*, 75 F. Supp. 2d 936 (E.D. Ark. 1999); *Contractors, Laborers* v. *Philip Morris*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999); *Laborers' & Operating Engineers'* v. *Philip Morris*, 42 F. Supp. 2d 943 (D. Ariz. 1999); *Hawaii Health & Welfare Trust Fund* v. *Philip Morris*, 52 F. Supp. 2d 1196 (D. Haw. 1999); *Williams & Drake Co.* v. *American Tobacco Co.*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998); *Seafarers Welfare Plan* v. *Philip Morris*, 27 F. Supp. 2d 623 (D. Md. 1998); *Southeast Florida Laborers* v. *Philip Morris*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998).

are without merit. In each state A.G. case where the issue was ultimately considered by the highest court of a state, the state supreme court recognized that third-party payors do *not* have an independent cause of action at common law.*

Moreover, far from "ignor[ing]" (Pet. 18) the State A.G. cases, the District Court below explicitly cited a number of these decisions that (as the District Court found) support *defendants*' position that dismissal of these cases was required. *See* App. 35 n.5 (citing *Iowa* v. *Philip Morris*, 577 N.W.2d 401 (Iowa 1998); *Minnesota* v. *Philip Morris*, 551 N.W.2d 490 (Minn. 1996); *Washington* v. *American Tobacco Co.*, 1997 WL 714842 (Wash. Super. Ct. June 6, 1997); *Maryland* v. *Philip Morris*, 1997 WL 540913 (Md. Cir. Ct. May 21, 1997)). But in any event, any hypothetical conflict between the D.C. Circuit's decision in the cases at bar and some state trial court decision would plainly not merit review by this Court.

IV. INDEPENDENT GROUNDS WOULD JUSTIFY AFFIRMING THE DECISION BELOW.

Review of the D.C. Circuit decision below is further unwarranted because there exist multiple grounds for affirming the decision, and review would not lead to reversal. *See* App. 39

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* *See Iowa* v. *Philip Morris*, 577 N.W.2d 401, 406-07 (Iowa 1998) ("the State cannot recover damages caused by defendants because the *injuries are derivative and too remote*"; to hold otherwise would "open the proverbial flood gates of litigation") (emphasis added); *Minnesota* v. *Philip Morris*, 551 N.W.2d 490, 495 (Minn. 1996) (dismissing Blue Cross's special duty claim as "simply too remote"; allowing certain state statutory claims to survive because specific statutes involved assertedly overcame remoteness bar); *Agency for Health Care* v. *Associated Indus.*, 678 So. 2d 1239, 1248 (Fla. 1996) (holding that state did not possess independent cause of action prior to 1994 anti-tobacco statute), *cert. denied*, 520 U.S. 1115 (1997). Thus, in the three instances where a state's highest court reached these issues, the courts — like the eight federal Courts of Appeals — recognized that "direct" claims by third-party payors are barred under traditional common-law principles (which, as noted above, this Court has applied to private actions under RICO and the federal antitrust laws, *see* pp. 6-7, *supra*).

(District Court: Had it been necessary "to reach defendants' other arguments," dismissal would also have been required "on many of those grounds as well."). The following are among the alternative grounds for affirmance:

1. Business or Property Injury: Petitioners' RICO and antitrust claims are barred not only because they are impermissibly remote but also because health-care costs occasioned by personal injuries are not injury to "business or property." 15 U.S.C. § 15; 18 U.S.C. § 1964(c); *see also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The health-care costs the Petitioners seek to recover are an integral component of the smokers' personal injury claims. *See, e.g., Metro-North* v. *Buckley*, 521 U.S. 424, 438-39 (1997); 2 Dobbs, *Law of Remedies* §§ 8.1(1), (3) (2d ed. 1999). For this reason (among others) Petitioners have not suffered the requisite "business or property" injury. *See, e.g., Laborers Local*, 191 F.3d at 241; *Oregon Laborers*, 185 F.3d at 964, 968. To permit third-party payors or providers to characterize the costs of treating personal injuries allegedly inflicted upon others as "business or property" injury to themselves would sanction a form of legal alchemy that would permit claims for personal injuries to be transformed into RICO and federal antitrust treble-damages claims, simply because some third person paid for or provided the injured person's medical expenses. There is no basis for such a result.

2. Antitrust Injury: Petitioners' antitrust claims fail because they do not plead that they suffered "antitrust injury," which this Court has defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield* v. *USA Petroleum*, 495 U.S. 328, 334 (1990); *Brunswick* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977); *see also Cargill* v. *Monfort*, 479 U.S. 104, 110-12 & n.5 (1986) ("antitrust injury" necessary for antitrust standing). The requirement of antitrust injury is a separate requirement under the antitrust laws in addition to the requirement of proximate cause. *See Cargill*, 479

U.S. at 110 n.5. The antitrust injury requirement ensures that a plaintiff's injury "corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield*, 495 U.S. at 342.

The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged male-factors. *See AGC*, 459 U.S. at 538. This is because "the central interest" of the antitrust laws is "protecting the economic freedom of participants in the relevant market." *Id.* The markets which defendants are alleged to have unreasonably restrained are "the market for cigarettes," JA119; JA157, and the "market for health care." JA123; JA159.* Defendants are plainly *not* participants in the market for health-care services, just as the plaintiff foreign governments are plainly *not* participants in the market for cigarettes.

In short, plaintiffs simply have not suffered "injury of the type the antitrust laws were intended to prevent." *See* App. 39-40 (District Court decision); *see also Oregon Laborers*, 185 F.3d at 966-67; *Teamsters*, 196 F.3d at 825.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

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* Ukraine did not assert any antitrust claims.

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